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No. 99-203

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

RALPH COYLE, WARDEN,

Petitioner,

vs.

DAVID A. MAPES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

MOTION TO PROCEED IN FORMA PAUPERIS

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David A. Mapes

20pp

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, David A. Mapes, through undersigned counsel, respectfully requests leave to file his Brief In Opposition To Certiorari to the Sixth Circuit Court Appeals without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent is indigent and has been represented by appointed counsel throughout the federal habeas process.

Respondent Mapes Affidavit in Support of this Motion is attached hereto.

Respectfully submitted,

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DAVID ALLEN MAPES,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

I swear or affirm under penalty or perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct, (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: David A. Mapes

DAVID A. MAPES

Instructions:

Complete all questions in this application and then sign it. Do not leave any blanks: If the answer to a question is "O,"-"none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: May 8. 99

My issues on appeal are:

I. Whether the prohibition against the imposition of death for an aider and abettor without a specific intent to kill as set forth in ***Enmund v.Florida***, 458 U.S. 782 (1982) is violated where the jury returns a general verdict of guilt on a felony-murder count and specific verdicts of not guilty on the death specifications which alleged that the defendant was either the principal offender or an aider and abettor with a specific intent to kill?

II. Whether the proper remedy for a meritorious claim of ineffective assistance of appellate counsel is the issuance of the writ conditioned upon a new state court appeal on the defaulted issues where the only conclusion the state court could arrive at consistent with the Sixth and Fourteenth Amendments is that a constitutional violation occurred warranting the imposition of a life sentence?

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount amount during the past 12 months	Amount expected next month
	You	You
Employment	$ NONE	$ NONE
Self-employment	$ NONE	$ NONE
Income from real property (such as rental income)	$ NONE	$ NONE
Interest and dividends	$ NONE	$ NONE

Gifts	$ NONE	$ NONE
Alimony	$ NONE	$ NONE
Child support	$ NONE	$ NONE
Retirement (such as social security,, pensions, annuities, insurance)	$ NONE	$ NONE
Disability (such as social security, insurance, payments)	$ NONE	$ NONE
Unemployment payments	$ NONE	$ NONE
Public-assistance (such as welfare)	$ NONE	$ NONE
Other (specify):	$ NONE	$ NONE
Total monthly income:	$ NONE	$ NONE

2. List your employment history, most recent employer first. (Gross monthly pay is before or other deductions.)

Employer	Address	Date of employment	Gross monthly Pay
NONE	NONE	NONE	NONE

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

NONE			

4. How much cash do you and your spouse have? $_____

Below, state any money you and your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE	NONE		NONE

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	Other real estate	(Value)	Motor Vehicle #1	(Value)
NONE				Make & year:	
				Model:	
				Registration #:	

Motor Vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year: NONE					
Model:					
Registration #:					

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE		

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually by show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ NONE	$
Are real-estate taxes included?	___ Yes	/ No
Is property insurance included?	___ Yes	/ No
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$	$
Home maintenance (repairs and upkeep)	$ NONE	$
Food	$	$

Clothing	$ None	$
Laundry and dry-cleaning	$ None	$
Medical and dental expenses	$ None	$
Transportation (not including motor vehicle payments)	$ None	$
Recreation, entertainment, newspapers, magazines, etc.	$ None	$
Insurance (not deducted from wages or included in		
Mortgage payment(s)		
Homeowners or renters	$ None	$
Life	$ None	$
Health	$ None	$
Motor Vehicle	$ None	$
Other: None	$	$
Taxes (not deducted from wages or included in Mortgage payments) (specify:		
Installment payments	$ None	$
Motor Vehicle Credit	$ None	$
card (name):	$ None	$
Department	$ None	$
store (name): None		
Other:		
Alimony, maintenance, and support paid to others	$ None	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ None	$
Other (specify):	$ None	$
Total monthly expenses:	$ None	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

___ Yes ___/___ No If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? $ None

If yes, state the attorney's name, address and telephone number:

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

___ Yes ___1___ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal. Death Row

13. State the address of your legal residence.

MANSFIELD CORRECTION FACILITY

Your daytime phone: None

Your age: 45 Your years of schooling 11th

Your social security number: 135-48-3148

No. _____

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BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE

Whether appellate counsel is required to pursue all non-frivolous claims on direct appeal?

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STATEMENT OF THE CASE

Respondent's trial counsel filed a total of four (4) written motions before trial; a request for a bill of particulars on March 4, 1983, and three (3) suppression motions on April 18, 1983. Trial commenced with voir dire on May 2, 1983. A jury was sworn in on May 9, 1983. The court then conducted hearings on the suppression motions.

Evidence began on May 11, 1983. The jury heard testimony from a total of twenty-six (26) witnesses. On May 24, 1983 the jury was charged and deliberation began. The jury submitted several questions to the court during three (3) full days of deliberations and finally returned a verdict on May 27, 1983. The jury acquitted Respondent of all the aggravating circumstances (*i.e.* death specifications) submitted to them thereby specifically finding that David Mapes was neither the triggerman nor an accomplice with specific intent.

The jury also acquitted Mr. Mapes of the count alleging an aggravated robbery of the decedent. Convictions were returned on the aggravated burglary, two (2) aggravated robbery counts, the two aggravated felony-murder counts, and to the gun specification.

At this point Mapes stood convicted of two aggravated felony-murder counts but acquitted of all aggravating circumstances. Nevertheless, the trial court continued the case for a penalty phase and scheduled a hearing on the remaining aggravating circumstance, the prior New Jersey Homicide.

The trial court convicted Respondent of an aggravating circumstance which had been tried to the bench, and a mitigation hearing was held to allow the jury to determine whether any mitigating factors were present and, if so, whether they outweighed the sole aggravating circumstance. During this hearing defense counsel waived opening statement, presented two (2) unsworn statements by Respondent, and rested.

The State rebutted Respondent's first unsworn statement with testimony from co-defendant Rodney Newton. The first unsworn statement presented by Respondent in mitigation was that he was not the triggerman in either homicide. In rebuttal, Newton testified that prior to trial Mapes had told him that he, David Mapes, was the triggerman in New Jersey, and the police could not do anything to them as long as they kept quiet.

Defense counsel attempted to impeach Newton. Counsel asked Newton whether he was aware that Elliott Hampton was the triggerman in the New Jersey homicide, that there were statements that had been given to the Patterson, New Jersey Police to this effect, and that Hampton was still in prison for this offense. Then prosecutor (now federal district court judge) Don Nugent objected to the cross-examination, arguing that the implication from this line of questioning was false and misleading, and had been fabricated by defense counsel. The trial court granted the prosecutor's objection, struck the questions and answers from the record, and instructed the jury to disregard the entire cross-examination.

Mitigation concluded, closing arguments were made, and the jury was instructed on the same day mitigation began; June 2, 1983. The jury retired to deliberate on the sentence. Jury deliberations continued for two (2) days. The jury returned with several questions, including one on June 3, 1983 inquiring about whether mitigation applied to the aggravating circumstance. Later that evening a deliberating juror, June Chatman, was taken to the hospital.

The jury returned a death verdict on June 4, 1983. The defense requested a jury poll, and June Chatman equivocated about her verdict. The judge accepted the verdict nevertheless and sentenced Respondent to death.

After sentencing Respondent, the trial court appointed two new attorneys to handle the appeal.

STATEMENT OF FACTS

David Mapes and one Rodney Newton were indicted in Cuyahoga County for the crime of aggravated felony-murder as well as aggravated robbery and aggravated burglary. The aggravated murder counts read together with the relevant aggravating circumstances alleged that Mapes was either the principal offender (*i.e.* triggerman) in the death of John Allen, or an aider and abettor who specifically intended to cause John Allen's death. These death specifications as well as non-death firearm specifications were submitted to the jury.

Respondent was also charged with an aggravating circumstance alleging that he committed and was convicted of a prior homicide in New Jersey, an essential element of which involved the purposeful killing of another. This aggravating circumstance was tried to the bench, and it is the only aggravating circumstance for which Respondent was convicted. The jury acquitted Mapes of being either the triggerman or an aider and abettor with specific intent by returning "not guilty" verdicts to all four (4) of the specifications alleging these aggravating circumstances.

Nevertheless, the case proceeded to a penalty phase and the jury was instructed on the presence of the aggravating circumstance upon which the trial court had entered judgment. After a brief mitigation hearing the jury recommended death and the trial court accepted the recommendation.

Different attorneys were appointed to represent David Mapes on appeal. An appeal was filed in the Cuyahoga County (Ohio) Court of Appeals, Eighth Appellate Judicial District raising twelve (12) assignments of error. The Appellate Court modified the sentence by merging the duplicitous aggravated murder counts, but otherwise affirmed the conviction as modified. The case was then briefed and argued in the Ohio Supreme Court which also affirmed the conviction

and sentence. The state court appellate attorneys failed to raise several substantial constitutional claims on direct appeal, including the trial judge's answer to a question returned by the then deliberating penalty phase jury. The trial court's answer to the question instructed the jury that "the mitigating factors do not apply to the prior murder conviction at all."

Present counsel undertook the representation of Respondent once the direct appeal to the Ohio Supreme Court was concluded, and have represented Mr. Mapes in all proceedings, both state and federal, since that date. State post-conviction litigation was concluded without an evidentiary hearing. Federal habeas litigation in district court was also concluded without an evidentiary hearing. The result of the Warden's appeal to the Sixth Circuit is an order remanding the case to the district court with instructions to hold an evidentiary hearing.

The magistrate judge, district court judge and a unanimous panel in the Sixth Circuit all found constitutional error warranting federal habeas relief based upon the trial judge's answer to the deliberating penalty phase jury's question. This issue was litigated in the context of a claim of ineffective assistance of appellate counsel. The Sixth Circuit remanded the case to the district court for an evidentiary hearing. Rehearing *en banc* was denied, and this petition by the Warden ensued.

REASONS FOR DENYING THE WRIT

Under ***Strickland v. Washington*** 466 U.S. 668 (1984) a habeas petitioner claiming ineffective appellate assistance must establish that there was a reasonable probability that he would have succeeded on direct appeal had an omitted issue been briefed and argued.

The Warden's argument for certiorari is that appellate counsel is not constitutionally required to pursue all non-frivolous claims on direct appeal. Petitioner then asserts that a court of appeals should not second guess the reasonable strategy of appellate counsel in this case. According to the Warden, that strategy was to winnow out weaker claims in pursuit of what reasonably appeared to be the most substantive issues.

There are two fundamental flaws in this argument. First, the claims appellate counsel failed to pursue were, *on their face*, not 'weaker claims' but rather, they were obvious and substantial constitutional issues. These are claims that were "clearly stronger than those presented." Pet. App. A-39. Appellate counsel raised twelve issues, all but one of which pertained to the trial phase of the case. As the Ohio Court of Appeals' opinion demonstrates, several of the assignments were almost entirely meritless. Pet. App. A-40. The issues raised in the habeas petition and found to have merit by the Sixth Circuit Court of Appeals were all issues relating to the penalty phase. In fact, the Sixth Circuit opinion raises a serious question about whether state court appellate counsel even read the sentencing transcript. Pet. App. A-40.

The second flaw in the Warden's logic is that there is no reason to believe that appellate counsel "chose" to winnow out any of these issues. Because of this lack of evidence, the Sixth Circuit remanded the case for an evidentiary hearing. At this point, the question of prejudice has already been decided, and it is the law of the case. The only question on remand is the performance prong of ***Strickland***, to wit: was there any rational tactical reason for counsel's failure to raise these issues (including the answer to the jury's question.)

Petitioner argues that, in essence, appellate counsel are constitutionally effective so long as any substantive issues are raised on direct appeal. This argument ignores the fact that the Sixth Circuit Court of Appeals found that several of the issues raised on direct appeal were almost entirely meritless. Neither ***Jones v. Barnes,*** 463 U.S. 745 (1983) nor ***Strickland v. Washington,*** 466 U.S. 668 (1984) suggest that raising some substantive claims, while failing to raise claims that obviously would have prevailed establishes effective appellate counsel.

In order for Respondent to prevail on a claim of ineffective appellate assistance under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), Respondent was required to show prejudice. In the context of ineffective appellate assistance this means that Respondent was required to establish a reasonable probability of success on direct appeal had the issue been briefed and argued. See, *e.g.*, ***Orazio v. Dugger***, 876 F.2d 1508, 1513-14 (11th Cir. 1989) (failure to raise a meritorious federal constitutional claim established ineffective appellate assistance regardless of how the state courts would have treated the claim). See also, ***Matire v. Wainwright***, 811 F.2d 1430, 1435-36 (11th Cir. 1987); ***Houston v. Lockhart***, 982 F.2d 1246 (8th Cir. 1993). This is what Respondent did and what the Sixth Circuit Court of Appeals held.

Petitioner also suggests that the Sixth Circuit created a new *ad hoc* eleven point ineffective assistance of counsel test. This statement mischaracterizes the opinion. Rather, the opinion merely listed several inquiries that should be considered in determining whether appellate counsel was reasonably competent. Pet. App. A-39. It is also important to note that the Sixth Circuit did not find ineffective appellate counsel. It merely remanded the case to the district court for an evidentiary hearing. Thus, at this point, the Sixth Circuit opinion is not a final order.

Finally, the Warden argues that the issue upon which the district court granted relief was based on a misreading of the record. Petitioner has argued throughout these proceedings that an instruction by the trial court that "[t]he mitigating factors do not apply to the prior murder conviction at all," did not preclude the jury from considering the mitigating factors relating to the prior conviction. That argument simply ignores the plain import of the words. A jury can never be precluded from considering mitigating factors. See ***Lockett v. Ohio***, 438 U.S. 536 (1978).

In ***Lockett***, the Court held that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. The ***Lockett*** court declared unconstitutional an Ohio Statute that prevented a sentencer from considering mitigation.

The decision in ***Lockett*** established a bright line rule; mitigation may not be precluded in a capital case. In ***Eddings v. Oklahoma***, 455 U.S. 104 (1982), the Court concluded that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 113-14. Similarly, in ***Hitchcock v. Dugger***, 481 U.S. 393, (1987), this Court vacated a death sentence where the trial court's instructions precluded the advisory jury from considering non-statutory mitigating factors. And in ***Skipper v. South Carolina***, 476 U.S. 1 (1986), the trial court excluded testimony concerning rehabilitation of the defendant. That, too, was held to violate the rule established by ***Lockett*** and its progeny.

Obviously, then, the trial judge's instruction to Mr. Mapes deliberating penalty phase jury deprived him of a fair sentencing hearing. This was a valid appellate issue that should have

been, but was not, raised by state court appellate counsel on direct appeal. Their failure to raise this and several other equally significant issues establishes ineffective appellate counsel under ***Strickland v. Washington.*** Indeed, these failures raise a serious question about whether they even read the penalty phase transcript in Respondent's case.

CONCLUSION

The writ should be denied in this case because (a) the Sixth Circuit order remanding the case for an evidentiary hearing is not the type of final order typically accepted by this Court for merit decision, and (b) there is nothing new or particularly significant in the Sixth Circuit's decision because that decision rests upon reasoning well within the compass of ***Lockett v. Ohio***, *supra*.

Respectfully submitted,

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